

ORIGINAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MANUEL JOSE VARGAS-SOTO,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Cr. No. 06-2123GT

Cv. No. 07-0648GT

**ORDER**

On April 9, 2007, Petitioner, Manuel Jose Vargas-Soto ("Mr. Vargas"), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Vargas requests a two level downward departure based on his status as a deportable alien, which Mr. Vargas asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Vargas's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Vargas's Motion to Modify Sentence is **DENIED**.

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2 First, Mr. Vargas pled guilty, pursuant to a written plea agreement, to two counts of illegal  
 3 entry by an alien, in violation of 8 U.S.C. § 1325. In the written plea agreement, Mr. Vargas  
 4 explicitly waived his right to appeal and/or collaterally attack his conviction or sentence. The  
 5 Ninth Circuit has long acknowledged that the terms of a plea agreement are enforceable. *See*,  
 6 United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1282 (1997).  
 7 Since Mr. Vargas expressly waived his statutory right to appeal or collaterally attack his sentence  
 8 in his plea agreement, Mr. Vargas is now precluded from challenging that sentence pursuant to 28  
 9 U.S.C. § 2255. *See*, United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that  
 10 a knowing and voluntary waiver of a statutory right is enforceable).

11 Moreover, even if Mr. Vargas had not expressly waived his right to appeal or collaterally  
 12 attack his sentence, his petition would still fail. In essence, Mr. Vargas argues that because of  
 13 his status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security  
 14 confinement." Mr. Vargas argues that the Court should grant him a two level downward  
 15 departure because of his status. However, Mr. Vargas's argument that the Court should depart  
 16 downward because he is a deportable alien is precluded by statute and current Ninth Circuit  
 17 case law. By statute, the Court may depart downward only if there are "aggravating or  
 18 mitigating circumstances . . . not adequately taken into consideration by the Sentencing  
 19 Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of  
 20 deportation is not a factor that the district court may consider for sentencing purposes. United  
 21 States v. Alvarez-Cardenas, 902 F.2d 734, 737 (9th Cir. 1990).<sup>1</sup> Accordingly,

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 26 <sup>1</sup> The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not  
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a  
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way  
 house pursuant to 18 U.S.C. § 3624(c). *See* United States v. Zepeda-Valles, 87 F.3d 1325 (9th  
 Cir. 1996).

1           **IT IS ORDERED** that Mr. Vargas's Motion to Modify Sentence is **DENIED**.

2           **IT IS SO ORDERED.**

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4           *Oct. 9, 2007*  
5           date

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7           GORDON THOMPSON, JR.  
8           United States District Judge

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10           cc: AUSA Bruce Castetter

11           Petitioner  
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